

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
)	2 CA-CR 2010-0153-PR
Petitioner,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
GERARDO ESCARCEGA RUIZ,)	Rule 111, Rules of
)	the Supreme Court
Respondent.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20062584

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

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ECKERSTROM, Judge.

¶1 Following a jury trial, the respondent Gerardo Ruiz was convicted of four counts of aggravated assault and one count of drive-by shooting. The trial court sentenced him to presumptive, concurrent terms of imprisonment, the longest of which was 10.5 years. We upheld his convictions and sentences on appeal. *State v. Ruiz*, No. 2 CA-CR 2007-0076 (memorandum decision filed May 29, 2008). After an evidentiary hearing on his petition for post-conviction relief, the trial court determined Ruiz had rejected the state’s plea offer due to the ineffective assistance of his counsel, and the court ordered the state to reinstate its previous plea offer pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). The state filed a timely petition for review pursuant to Rule 32.9(c), Ariz. R. Crim. P., arguing the trial court lacked authority to grant this remedy and *Donald* was wrongly decided to the extent it held otherwise.

¶2 The state does not dispute the trial court’s findings regarding counsel’s ineffectiveness and Ruiz’s resulting prejudice. The sole question presented on review is whether *Donald*’s remedy of ordering the state to reinstate a specific plea offer violates the separation of powers doctrine set forth in article III of the Arizona Constitution. We review this purely legal issue de novo. *See State v. Montes*, 223 Ariz. 337, ¶ 8, 223 P.3d 681, 683 (App. 2009).

¶3 In *Donald*, Division One of this court held that “a defendant may state a claim for post-conviction relief on the basis that counsel’s ineffective assistance led the defendant to make an uninformed decision to reject a plea bargain and proceed to trial.” 198 Ariz. 406, ¶ 14, 10 P.3d at 1200. It also held that the remedy for such ineffective assistance may include an order that “the prosecution . . . reinstate a plea offer if, after

conducting a hearing and permitting the State to present all relevant considerations, the court finds reinstatement necessary to remedy a deprivation of effective counsel.” *Id.*

¶ 44. Such a remedy, *Donald* held, does not violate our state constitution’s separation of powers doctrine. *Id.*

¶ 4 We acknowledge that *Donald* has been thoughtfully criticized by members of both divisions of this court, both for its conclusion that a defendant can suffer constitutionally significant prejudice in rejecting a plea offer due to the ineffective assistance of counsel, *see State v. Vallejo*, 215 Ariz. 193, ¶¶ 10-16, 158 P.3d 916, 919-21 (App. 2007) (Howard, J., concurring), and its conclusion that a court may order the state to reinstate a plea offer without offending separation of powers principles. *See State ex rel. Thomas v. Rayes*, 213 Ariz. 326, ¶¶ 21-26, 141 P.3d 806, 814-16 (App. 2006), *vacated on other grounds*, 214 Ariz. 411, ¶¶ 15, 21, 153 P.3d 1040, 1043-44 (2007); *Donald*, 198 Ariz. 406, ¶¶ 48-52, 10 P.3d at 1205-06 (Berch, J., concurring in part and dissenting in part). Some of the judges of this court have shown reluctance to endorse *Donald*’s reasoning and holdings. *E.g.*, *State v. Jackson*, 209 Ariz. 13, ¶ 9 & n.6, 97 P.3d 113, 116 & 118 n.6 (App. 2004). However, we generally accept a prior decision of our court as binding precedent unless it is clearly wrong or changed conditions have made it inapplicable. *Castillo v. Indus. Comm’n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974).

¶ 5 In its petition for review, the state essentially restates arguments previously made by members of our court that were critical of *Donald*’s remedy. We note, however, that the *Donald* majority approved the aforementioned remedy after undertaking a

scholarly and comprehensive analysis of the issue. 198 Ariz. 406, ¶¶ 35-44, 10 P.3d at 1203-05. And, we cannot overlook that our supreme court has passed up at least two opportunities to reject that reasoning, first in denying the petition for review in *Donald* itself and again in *Raves*, where it reserved ruling on the issue. 214 Ariz. 411, ¶ 15, 153 P.3d at 1043. As an intermediate court of appeals, we therefore follow the lead of our supreme court and decline to disturb *Donald*'s holding now, over a decade after the case was decided.

¶6 We follow *Donald*'s holding that a trial court may, under appropriate circumstances, order reinstatement of a plea offer as a remedy for ineffective assistance of counsel occurring during the plea process. Thus, although we grant review of the state's petition, we deny relief.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge